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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 Blizzard Entertainment, Inc., and Valve
16 Corporation,

17 Plaintiffs,

18 v.

19 Lilith Games (Shanghai) Co. Ltd., and
20 uCool, Inc.,

21 Defendants.
22
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25
26
27
28

CASE NO. 3:15-cv-04084-CRB

**DEFENDANT UCOOL, INC.'S NOTICE
OF MOTION AND MOTION FOR
SANCTIONS**

Date: March 10, 2016
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Judge: The Hon. Charles R. Breyer

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PLEASE TAKE NOTICE that on March 10, 2017 at 10:00 a.m., or as soon thereafter as counsel may be heard, before the Honorable Charles R. Breyer, in Courtroom 6 located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendant uCool, Inc. will and hereby does move the Court to sanction Plaintiffs Blizzard Entertainment, Inc. and Valve Corporation pursuant to Federal Rules of Civil Procedure 11(c) and 26(g), and 28 U.S.C. §1927.

DATED: January 11, 2017

By /s/ *Evette D. Pennypacker*

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ISSUES TO BE DECIDED

- i. Should Plaintiffs and their counsel be sanctioned through dismissal of this action for making material, false statements in their First Amended Complaint, which allegations were made without a reasonable investigation, in violation of Federal Rule of Civil Procedure 11?
- ii. Should Plaintiffs and their counsel be sanctioned through dismissal of this action for making material, false statements in their briefing and oral argument made in Opposition to uCool's Motion to Dismiss the First Amended Complaint, which statements were made without a reasonable investigation, in violation of Federal Rule of Civil Procedure 11?
- iii. Should Plaintiffs and their counsel be sanctioned through dismissal of this action for failing to dismiss their complaint after discovering evidence demonstrating their claims lacked sound legal or factual foundations, in violation of Federal Rule of Civil Procedure 11 and 28 U.S.C. §1927?
- iv. Should Plaintiffs and their counsel be sanctioned for: (i) providing an incorrect and misleading response to uCool's interrogatory on DotA ownership, and (ii) repeatedly misrepresenting that their DotA ownership related document production was complete, even when it was not; either of which is a violation of Federal Rule of Civil Procedure 26(g)?

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 uCool has been forced to spend extensive resources defending claims Plaintiffs did not
3 investigate and had no factual basis to bring. Evidence uCool gathered demonstrates as a matter
4 of law that neither Plaintiff Blizzard Entertainment, Inc. (“Blizzard”) nor Valve Corporation
5 (“Valve” and collectively with Blizzard “Plaintiffs”) conducted any investigation to confirm that
6 either (or even both combined) owned the copyrights to DotA, the work from which the asserted
7 Dota 2¹ indisputably derives. Had either Blizzard or Valve conducted even the most
8 rudimentary pre-filing investigation, they would have easily learned that numerous authors
9 contributed to the creation of the asserted characters. And, when they learned these facts in
10 discovery, they still did nothing to correct their error. Instead, in the face of uCool's motion to
11 dismiss, Plaintiffs' doubled down on their position, repeatedly telling the Court that there were
12 only four DotA authors and that Plaintiffs had obtained rights from all four. Then, when the
13 Court ordered discovery on DotA ownership, Plaintiffs hid documents while falsely representing
14 again and again that they had produced all documents – a position that may have remained
15 undetected had it not been for uCool's receipt of documents from a third party.

16 What makes all of this even more egregious is that Plaintiffs' lead counsel must have had
17 extensive knowledge of these issues, which relate to lead counsel's prior work for Blizzard.
18 Lead counsel represented Blizzard when the End User License Agreement that failed to assign
19 rights from DotA authors to Blizzard was in effect, when Blizzard accused Riot of violating its
20 trademarks and obtained an assignment from one of the alleged DotA authors, and when Blizzard
21 accused Valve of violating Blizzard's copyrights and [REDACTED]

22 [REDACTED] And, the same in-house
23 counsel that represents Valve now represented Valve at all times relevant to this lawsuit, including
24 when Valve obtained an assignment from Kyle Sommer, [REDACTED]
25 [REDACTED] and in 2009-2010 when Valve hired
26 [REDACTED] and had a dispute over DotA copyrights with [REDACTED]

27 _____

28 ¹ Valve dropped the capital A in DotA when it named the sequel, Dota 2.

1 Despite their counsels' intimate familiarity with the history and documentation related to
2 DotA ownership, Plaintiffs falsely represented to this Court that Plaintiffs owned all rights to
3 DotA and, after repeatedly telling uCool their DotA ownership document productions were
4 complete, Plaintiffs failed to produce literally thousands of pages of DotA ownership documents
5 until after all of Plaintiffs' DotA ownership-related 30(b)(6) depositions were complete.

6 Plaintiffs and their counsel have been delinquent in their Rule 11 duties. *See, e.g. Lloyd*
7 *v. Schlag*, 884 F.2d 409, 412 (9th Cir. 1989) (failure to investigate copyright transfer agreements
8 violated Rule 11); *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 892 F.2d 802, 804
9 (9th Cir. 1989), *aff'd*, 498 U.S. 533 (1991). Plaintiffs' conduct also falls below the standards set
10 forth in 28 U.S.C. §1927 and Federal Rule of Civil Procedure 26(g). *See, e.g. Cotterill v. City &*
11 *Cty. of San Francisco*, 2010 WL 1223146, at *6 (N.D. Cal. Mar. 10, 2010) (§1927 mandates that
12 counsel change course upon learning their claims are baseless); *Silva v. TEKsystems, Inc.*, 2013
13 WL 3939500, at *3 (N.D. Cal. July 25, 2013) (misrepresenting that all documents have been
14 produced is sanctionable under Rule 26(g)).

15 uCool thus moves for dismissal of this action as a sanction on the grounds that Plaintiffs:
16 (i) violated Rule 11 by making numerous, material, false statements in the FAC and failing to
17 conduct an adequate prefiling investigation, (ii) violated Rule 11 by making demonstrably false
18 statements in their opposition to uCool's motion to dismiss, (iii) violated both 28 U.S.C. §1927
19 and Rule 11 by failing to drop or amend their claims even after they learned of the FAC's defects,
20 and (iv) violated Rule 26(g) by making misrepresentations in their interrogatory responses, and by
21 misrepresenting to uCool that document production was complete while withholding highly
22 relevant documents until after all of Plaintiffs' 30(b)(6) DotA ownership depositions ended.

23 **II. FACTUAL AND PROCEDURAL BACKGROUND**

24 ***Plaintiffs' First Complaints Failed to State a Cause of Action.*** Plaintiffs first accused
25 uCool of infringing the copyrights at issue on May 29, 2015, when they lodged a complaint-in-
26 intervention in prior litigation between uCool and its present codefendant, Lilith Games
27 (Shanghai) Co., Ltd. *See Lilith Games (Shanghai) Co., Ltd. v. uCool, Inc.*, Case No. 15-cv-1267
28 (N.D. Cal. 2015) Dkt. 43-1. That attempt to intervene was denied. *Id.* at Dkt. 93. Plaintiffs

1 then refiled substantially the same complaint on September 8, 2015, initiating this litigation. *See*
2 Dkt. 1. uCool filed a motion to dismiss arguing: (i) Plaintiffs did not adequately allege
3 ownership of copyrights in “Defense of the Ancients” or “DotA,” (ii) Plaintiffs did not adequately
4 identify representative examples of infringement, and (iii) Plaintiffs did not adequately describe
5 the allegedly infringed characters. *See, generally* Dkt. 20. The Court granted uCool's motion
6 and dismissed Plaintiffs’ complaint with leave to amend. Dkt. 35.

7 ***Plaintiffs’ First Amended Complaint Contains Numerous False Allegations.*** To
8 address the issues identified in the Court's order on uCool’s motion to dismiss, Plaintiffs filed a
9 First Amended Complaint, signed by their lead counsel, that made the following allegations:

- 10 • “Pursuant to written agreements, Blizzard and Valve collectively own 100% of the
11 copyright in all original expression embodied within the DotA mod.” FAC ¶26.
- 12 • “Each of DotA’s heroes was derived from a character model . . . present in
13 Warcraft III.” FAC ¶24.
- 14 • “Each DotA character’s set of skills is represented in game using an icon derived
15 from Warcraft III.” FAC ¶25.
- 16 • Valve’s “protected expression” encompasses the following characters which
17 appeared in DotA and Dota 2: Enchantress, Spirit Breaker, Queen of Pain,
18 Demnok, Tidehunter, Pugna, Slithice, and Axe. FAC ¶¶ 28, 46, 47, Exhibit B.

19 Based on publicly available documents, uCool understood that these allegations could not
20 be correct, and uCool filed a second motion to dismiss. *See* Dkt. 44.

21 ***Plaintiffs Make Further False Statements in Opposition to uCool’s Motion to Dismiss.***
22 Rather than backing down, Plaintiffs filed an opposition—also signed by lead counsel—which
23 further misrepresented that there are “**only** four authors of DotA: Eul, Icefrog, Guinsoo, and
24 Pendragon.”² Dkt. 55 at 3 (emphasis added). Plaintiffs' counsel reiterated this alleged fact at
the April 8, 2016 hearing³. April 8, 2016 Hg. Tr. at 13. This claim was false. Pendragon was
the webmaster for the DotA forums, not an author of DotA. Mescon Depo. 136:11-137:2.

25 ² The creators of DotA and DotA Allstars shared their work over the internet using
26 pseudonymous “screen names”; most testified that they do not know the real names of the other
27 individuals they worked with, so their testimony used those same screen names. *See* Moss Depo.
28 22:20-23:10; Baker Depo. 26:22-29:15; [REDACTED] A chart matching the witnesses
to their screennames is attached as Exhibit DD to the LaFond Declaration.

³ A transcript of the April 8, 2016 hearing is attached as Exhibit AAA to the LaFond Declaration.

1 *How Defense of the Ancients Was Actually Created.* In 2002, Blizzard released a
2 computer game entitled Warcraft III: Reign of Chaos which was bundled with a separate program
3 called the “World Editor” that permitted Warcraft III users to create customized modifications to
4 Warcraft III called “mods” or “maps.” FAC ¶¶ 13,22; [REDACTED]⁴. The World
5 Editor program was subject to an end user license agreement that does not contain any clauses
6 assigning copyrights in user-created content back to Blizzard, meaning users own the copyright in
7 any content they create. See LaFond Decl. Exs. D & E (Blizzard’s EULAs). Put simply,
8 Blizzard authorized its users to create certain content but never had any agreement that user
9 created content would belong to Blizzard.⁵

10 In 2002, Eul (Kyle Sommer), developed a mod called “Defense of the Ancients,”
11 abbreviated as “DotA.” Sommer Depo 52:19-53:10. In 2004, Eul ceased working on DotA and
12 issued a public statement that other players were free to create new versions of DotA without his
13 consent. Sommer Depo. 59:13-64:19. In 2010—years after his dedication to the public—Eul
14 assigned whatever rights he retained in DotA to Valve. Sommer Depo. 101:11-103:9.

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]⁷

22 Despite alleging they own “100% of the copyright,” and that the Queen of Pain is Valve’s
23 “protected expression,” [REDACTED]

24 _____
25 ⁴ Cited transcript excerpts are attached as exhibits FF through MM to the LaFond Declaration.

26 ⁵ Of course, under the Copyright Act, any such assignment of rights from the customer to
Blizzard would have to be in writing, signed by the user. See, 17 U.S.C. § 204 (a).

27 ⁶ [REDACTED]
28 [REDACTED]

1 [REDACTED] FAC ¶¶26, 47.

2 *Guinsoo Continues to Develop DotA Allstars.* [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED] Character submissions were typically very detailed, two to three pages long, and
10 contained character backstories, a selection of abilities or powers, proposed graphics, and
11 numerical values for the character's attributes. *See, e.g.* Baker Depo. 112:10-114:17; LaFond
12 Decl. Ex. QQ.; [REDACTED] Some players would submit characters by
13 programming them into a simple "test" mods (also referred to as a "test map" or "sample map")
14 using the World Editor. Baker Depo. 165:2-11; Moss Depo. 102:24-103:21. Players whose
15 work went into DotA Allstars include Neichus (Alex Moss), Terrorblaze (Derek Baker), [REDACTED]
16 [REDACTED] Moss Depo. 47:14-49:18; Baker Depo. 146:10-148:4.
17 These individuals created characters identified in the complaint, including Axe, Tidehunter, and
18 Spirit Breaker. Moss Depo. 112:10-133:1; Baker Depo. 146:17-18; FAC Ex. B.⁹

19 Prior to filing the complaint, neither Blizzard nor Valve ever contacted Neichus, much less
20 executed an assignment for the characters Neichus created. Moss Depo. 138:3-6. Nor did
21 Blizzard or Valve ever contact or receive an assignment from TerrorBlaze, Syl-la-ble, or Zetta.
22 Baker Depo. 186:17-187:11. Nonetheless, the FAC falsely claims that Plaintiffs owned all
23 characters created by both Neichus and Terrorblaze. *See* FAC ¶26, Ex. B.

24 *Neichus and Icefrog Work on DotA Allstars.* In 2005, Neichus worked on a handful of
25 DotA Allstars versions, incorporating new characters submitted by TerrorBlaze, AfroThunder,

26 _____

27 ⁸ [REDACTED]

28 ⁹ For the Court's convenience, a chart matching the characters in the FAC to the lines of
deposition testimony identifying their creator is attached as Exhibit EE to the LaFond Declaration.

1 Cottontop, and ShadowPenguin. Moss Depo. 107:5-108:20; Baker Depo. 146:3-149:18. After
2 Neichus stopped working on DotA, Icefrog added characters submitted by TerrorBlaze,
3 CottonTop, and others. Baker Depo. 188:8-190:2. Guinsoo later worked for Riot Games, Inc.,
4 and in 2011, assigned any rights he had in DotA to Riot, who subsequently transferred those rights
5 to Blizzard (not Valve). [REDACTED] Dkt. 43-10. [REDACTED]

6 [REDACTED]
7 *Valve Attempts to Commercialize DotA, Sparking Conflict with Blizzard.* In 2009,
8 Valve decided to commercialize DotA by creating a sequel named Dota 2 and sought a trademark
9 in Dota 2 in 2010. [REDACTED]; Dkt. 44-10 at ¶22. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 *Blizzard and Valve Never Investigated DotA's Authors.* [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED] It also appears that neither party spoke to Icefrog, even though Icefrog is a **Valve**
27 **employee.** [REDACTED]

28 [REDACTED] Nonetheless, Plaintiffs never contacted either Neichus or Terrorblaze

1 before filing the FAC. Moss Depo. 138:3-6; Baker Depo. 186:17-187:11. Instead, Plaintiffs
2 misrepresented in the FAC that “Blizzard and Valve collectively own 100% of the copyright in all
3 original expression embodied within the DotA mod.” FAC ¶26. Then, despite his prior claims
4 that [REDACTED]
5 Plaintiffs' lead counsel further misrepresented to the Court that there were “only four authors of
6 DotA: Eul, Icefrog, Guinsoo, and Pendragon”. Dkt. 55 at 3; April 8, 2016 Hg. Tr. 13:13.

7 The FAC also falsely alleges that Valve’s “protected expression” encompasses the
8 characters Spirit Breaker, Axe, Enchantress, Queen of Pain, Demnok Tidehunter, Pugna, and
9 Slithice. In fact, Valve did not have an assignment or exclusive license for any of those
10 characters at the time the complaint was filed. [REDACTED]

11 [REDACTED] Moss Depo. 108:15-108:20; 113:7-9; 118:2-11; Baker Depo. 146:17-18; 158:6-164:5; FAC
12 ¶¶28, 46, 47, Ex. B; *see also* LaFond Decl. Exs. EE, PP.

13 Plaintiffs’ failure to investigate continued **throughout the litigation.** [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 ***Blizzard and Valve Never Investigate How DotA was Created.*** DotA was originally
17 created by modifying Blizzard’s Warcraft III, however, every DotA author has stated that DotA
18 uses some outside graphics to create new character models and icons. [REDACTED]

19 Baker Depo. 168:21-24; Moss Depo. 29:13-18; [REDACTED] DotA thus contains
20 icons and character models not present in Warcraft III; [REDACTED]

21 [REDACTED] Thus, the FAC’s allegations that “[e]ach of DotA’s heroes was derived from a
22 character model . . . present in Warcraft III” and “[e]ach DotA character’s set of skills is
23 represented in game using an icon derived from Warcraft III,” are false. FAC ¶¶24, 25.

24 ***Blizzard and Valve Undermine the Court’s Order Staging Discovery.*** Even though the
25 Court denied uCool’s Motion to Dismiss the FAC, the Court limited discovery to DotA ownership
26 with the understanding that uCool could file an expedited motion for summary judgment. *See*
27 April 8, 2016 Hg. Tr. at 14 (“It appears to me that discovery should be limited . . . I’ll see you
28 back here in 90 days or 120 days and we’ll sort through”); *see also* Dkt. 79. Nonetheless, by

1 May of 2016, Plaintiffs were still withholding discovery on DotA ownership, so uCool moved to
2 compel. *See* Dkt. 90. Magistrate Judge Corley granted the motion, ordered Valve to
3 supplement its response to uCool's Interrogatory No. 7, and ordered the Parties to agree to a list of
4 custodians and search terms. LaFond Decl. ¶¶24-32.

5 Valve supplemented Interrogatory No. 7 but did not identify [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 In August, 2016 Plaintiffs' counsel represented in writing that Plaintiffs had fully complied
10 with Judge Corley's order and produced all documents. LaFond Decl. ¶¶34-38. uCool raised
11 concerns, but, surprisingly lead counsel **again** stated Plaintiffs had completed their production.
12 *Id.* Relying on these representations, uCool scheduled depositions. *Id.* ¶39.

13 ***Blizzard and Valve are Caught Withholding Documents.*** Prior to August 2016, uCool
14 found an internet post allegedly written by an anonymous Valve employee, stating that Icefrog's
15 prior employer, S2 Games, LLC, may have a superior claim to Icefrog's alleged rights in DotA.
16 *See* LaFond Decl. Ex. SS. uCool served a Rule 45 subpoena, and S2 Games produced
17 documents on September 9, 2016. S2 Games' production included documents **never produced**
18 by Valve that: [REDACTED]
19 [REDACTED]

20 [REDACTED] On September 22, 2016, in response to a demand from uCool, and the night after the first
21 Valve 30(b)(6) deposition, Valve produced its copy of those documents. LaFond Decl. ¶¶47-48.

22 After learning Valve had withheld documents—despite lead counsel's claims to the
23 contrary—uCool demanded that Plaintiffs immediately produce all documents as ordered by Judge
24 Corley, and also provide uCool with declarations signed under penalty of perjury explaining why
25 documents were withheld; lead counsel agreed. LaFond Decl. ¶¶49-55 & Exs. W, X. However,
26 by that time, Plaintiffs' 30(b)(6) depositions had already been scheduled and were nearly
27 complete. LaFond Decl. ¶¶39; 56-59. Plaintiffs collectively produced **39,599 pages** of
28 documents **after** the depositions were completed. *Id.* ¶¶56-59. Several of the late produced

documents demonstrate that Plaintiffs’ prior representations were simply false:

- [REDACTED]
- [REDACTED]
- [REDACTED]

Blizzard and Valve Refuse to Drop Untenable Claims. [REDACTED]

[REDACTED] Nonetheless, Plaintiffs did not amend their claims, their complaint, or **any** discovery responses, and instead stood by while uCool expended months of attorney time and resources to reveal what Plaintiffs already knew: that Plaintiffs could not possibly own all of the asserted characters.

III. APPLICABLE LEGAL STANDARDS

Federal Rule of Civil Procedure 11 requires attorneys to certify that in every pleading or other paper presented to the Court “the claims, defenses, and other legal contentions are warranted by existing law,” and “the factual contentions have evidentiary support.” When determining whether Rule 11 has been violated, “a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually ‘baseless’ from an objective perspective, and (2) if the attorney has conducted ‘a reasonable and competent inquiry’ before signing and filing it.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002). When examining the claims in the complaint, “[t]he presence of one non-frivolous claim in the complaint

¹⁰ Plaintiffs refused to disclose Guinsoo’s contact information for months, even after ordered to supplement an interrogatory response. *See* LaFond Decl. ¶¶84-103.

1 does not insulate the remainder of the complaint from a motion for Rule 11 sanctions.”
2 *Kinderstart.com LLC v. Google, Inc.*, 2007 WL 831811, at *1 (N.D. Cal. Mar. 16, 2007).

3 28 U.S.C. § 1927 sanctions “[a]ny attorney . . . who [] multiplies the proceedings in any
4 case unreasonably and vexatiously[.]” Sanctions under § 1927 do not require a showing of bad
5 faith, and are available where an attorney acts in a knowingly, reckless manner. *B.K.B. v. Maui*
6 *Police Dep’t*, 276 F.3d 1091, 1107 (9th Cir. 2002), *as amended* (Feb. 20, 2002). “Once counsel
7 is or should be aware of the impropriety of his or her conduct, the costs, expenses, and attorneys’
8 fees for any subsequent proceedings may be considered to be excess expenses and counsel may be
9 required to personally pay them under § 1927.” *Cotterill v. City & Cty. of San Francisco*, 2010
10 WL 1223146, at *6 (N.D. Cal. Mar. 10, 2010).

11 Federal Rule of Civil Procedure 26(g) requires that an attorney sign all discovery
12 responses, certifying that the information contained within them is based on “knowledge,
13 information, and belief formed after a reasonable inquiry[.]” When ruling on a sanctions motion
14 under Rule 26(g), courts apply an “objective” standard, and bad faith is not required. *Oregon*
15 *RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P’ship*, 76 F.3d 1003, 1008 (9th Cir. 1996).

16 **IV. ARGUMENT**

17 uCool has been forced to litigate a meritless claim that Plaintiffs and their counsel failed to
18 investigate **before filing suit**, or to correct even when apprised of their reckless behavior during
19 the suit. This is precisely what Rule 11 and 28 U.S.C. § 1927 are designed to prevent. *See, e.g.*
20 *Christian*, 286 F.3d at 1128; *Bus. Guides*, 892 F.2d at 804. uCool has also been prejudiced by
21 Plaintiffs repeated certifications that their discovery was complete when it was not—a violation of
22 Rule 26(g). Accordingly, Plaintiffs’ baseless claims should be summarily dismissed, and both
23 Plaintiffs and their counsel should be sanctioned.

24 At least the following acts justify the relief sought: (i) filing the FAC with material, false
25 allegations stated without investigation, (ii) opposing uCool’s motion to dismiss with material,
26 false, uninvestigated statements; (iii) failing to dismiss or amend claims after learning the truth
27 from Neichus and Guinsoo; and (iv) making misrepresentations in discovery responses and
28 repeatedly claiming their document production was complete when it was not.

1 **A. The First Amended Complaint Contained Material, False Allegations.**

2 Valve avoided dismissal by making a factually baseless claim as to copyright ownership,
3 and a separate, legally baseless claim that it had standing based on a non-exclusive license.

4 **1. Valve’s claim is factually baseless.**

5 To state a claim for copyright infringement, Valve first had to own a valid copyright.
6 *Choyce v. SF Bay Area Indep. Media Ctr.*, 2014 WL 2451122, at *4 (N.D. Cal. June 2, 2014).
7 This was a problem for Valve because the asserted work—Dota 2—is a derivative work; and “a
8 derivative author may own the copyright in material the author contributed to a preexisting work,
9 but not in infringing material or material the author did not create.” *U.S. Auto Parts Network,*
10 *Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1016 (9th Cir. 2012); *see also* FAC ¶ 28 (“Dota 2’s
11 heroes are derived from heroes present in DotA”). **Every** asserted Dota 2 character in the FAC
12 first appeared in DotA; this is stated in FAC Exhibit B and was reaffirmed in Valve’s responses to
13 contention interrogatories. FAC Ex. B; LaFond Decl. Ex. OO. Thus, Valve could never have
14 stated a claim against uCool based on Dota 2 without separately alleging that Valve owned DotA.

15 Valve’s solution was to falsely allege that, collectively with Blizzard it “owned 100% of
16 the copyright” in DotA, and that certain DotA characters were Valve’s “protected expression.”
17 FAC ¶¶ 26, 28, 47, Ex. B. But Valve never received assignments covering those characters, and
18 Plaintiffs could not have owned “100%” of the DotA copyright when they filed the FAC—they
19 did not obtain any copyrights from Neichus until six months later. LaFond Decl. Ex. I.
20 Plaintiffs also never obtained any copyrights from [REDACTED] or Terrorblaze, even though
21 they created characters asserted in the FAC. [REDACTED]

22 [REDACTED] Moss Depo. 108:15-108:20; 113:7-9; 118:2-11; Baker Depo. 146:17-18; 158:6-164:5.

23 [REDACTED]
24 Why did he not talk to any of them before suing uCool?

25 [REDACTED]
26 [REDACTED]
27 [REDACTED] Moreover, despite
28 numerous public reports stating that Neichus created much of DotA’s content, Plaintiffs never

1 contacted Neichus before filing suit. Moss Depo. 138:3-6; LaFond Decl. Exs. A, B. And, had
2 Plaintiffs spoken to Icefrog, a Valve employee, before filing, then [REDACTED]

3 [REDACTED]
4 In sum, Plaintiffs executed copyright assignments without ever asking the assignors what
5 they created, then filed suit in the hopes that some claims would stick; that is not sufficient under
6 Rule 11. *Kinderstart.com LLC* 2007 WL 831811, at *1. Accordingly, Valve's claim is
7 frivolous, was not investigated, and should be dismissed as a sanction under Rule 11. *See, e.g.*
8 *Pannonia Farms, Inc. v. USA Cable*, 2004 WL 1276842 (S.D.N.Y. June 8, 2004) (plaintiff subject
9 to Rule 11 sanctions for alleging infringement of characters where plaintiff only owned rights in
10 derivative works and not the original characters).

11 **2. Valve's claim is legally baseless.**

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] This is a legally baseless claim.

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24
25 ¹¹ In addition to not speaking with Icefrog before filing suit, Plaintiffs also did not provide Icefrog
with a document hold notice for **11 months**. LaFond Decl. ¶¶67-74.

26 ¹² *See Hulex*, 115 F.R.D. at 304; *Cass Cty. Music Co. v. I.G.L. Racquet Club, Inc.*, 1987 WL
8593, at *1 (N.D. Iowa Feb. 25, 1987); *Bourne Co. v. Hunter Country Club, Inc.*, 990 F.2d 934,
27 937 (7th Cir. 1993); *Ctr. City Music v. Kisner*, 23 F.3d 400 (4th Cir. 1994) (unpublished).

28 ¹³ ASCAP is an acronym for "the American Society of Composers, Authors, and Publishers."
Hulex Music v. C.F. Maint. & Prop. Mgmt., Inc., 115 F.R.D. 303, 304 (D. Neb. 1987).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Valve's claim is thus legally baseless as well as factually baseless.

6 **B. Plaintiffs' Made False Statements to Overcome uCool's Motion to Dismiss.**

7 Rather than reconsider their position after receiving uCool's motion to dismiss, Plaintiffs
8 doubled down on baseless allegations by claiming there are "only four authors of DotA: Eul,
9 Icefrog, Guinsoo, and Pendragon." Dkt. 55 at 3 (emphasis added); April 8, 2016 Hg. Tr. at 13.
10 Again, an interview with Icefrog—who is, and was, a Valve employee—would have revealed that
11 [REDACTED] This
12 implies that Plaintiffs' counsel did not speak to Icefrog even after receiving uCool's motion to
13 dismiss, and his subsequent statements were also unverified. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] To save their

18 complaint from dismissal, Plaintiffs and their lead counsel made false statements without attempts
19 at verification: the very definition of a Rule 11 violation. *Bus. Guides*, 892 F.2d at 804.

20 **C. Plaintiffs Failed to Amend or Dismiss Their Claims After Learning the Truth.**

21 Pursuant to Rule 11, "[w]hen it becomes apparent that a case lacks evidentiary support, a
22 client and his lawyer have a duty to withdraw their complaint." *Byrnes v. Lockheed-Martin, Inc.*,
23 2005 WL 3555701, at *9 (N.D. Cal. Dec. 28, 2005). Likewise, once counsel knows, or should
24 know, that their claims are baseless, they cannot continue to press those claims pursuant to 28
25 U.S.C. § 1927. *Cotterill*, 2010 WL 1223146, at *6. Here, Plaintiffs should have amended or
26 dismissed the FAC on at least two occasions.

27 First, in May 2016, uCool located Neichus, interviewed him, completed interrogatory
28 responses based on his knowledge and disclosed his identity to Plaintiffs. LaFond Decl. ¶¶77-81.

1 [REDACTED] Of
2 course, “[i]f Plaintiff[s] lacked standing to sue at the time the case was filed, [they] cannot now
3 ‘cure’ this fundamental lack with a later assignment of rights.” *Minden Pictures, Inc. v. John*
4 *Wiley & Sons, Inc.*, 2013 WL 1995208, at *9 (N.D. Cal. May 13, 2013). Nonetheless, neither
5 Plaintiff took action to amend the FAC even though the Neichus assignment demonstrates **neither**
6 Plaintiff owned any rights Neichus had when they filed the FAC.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED] Faced with this knowledge, Plaintiffs had a
11 duty to withdraw those claims. *Byrnes*, 2005 WL 3555701, at *9. They did not.

12 **D. Plaintiffs’ Misrepresentations in Discovery.**

13 uCool’s Interrogatory No. 7 asked Valve to identify the author of each DotA character they
14 claimed to own; instead of admitting that they were unsure as to the authorship of some characters,
15 Valve fabricated an answer, without investigation, that proved completely wrong. Valve never
16 interviewed Neichus, yet claimed that he was not an author of any DotA content. *See* LaFond
17 Decl. Ex. PP; Moss Depo. 138:3-6. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED] Even when Valve finally interviewed Neichus, they appeared disinterested in the truth:
21 Neichus testified Valve never asked **what** he had created. Moss Depo. 153:22-154:20.

22 Separately, uCool only learned that Plaintiffs had repeatedly misrepresented that their
23 document productions were complete **by chance**—had uCool never subpoenaed S2 Games, the
24 truth would not have come out. LaFond Decl. ¶¶40-55. [REDACTED]

25 [REDACTED]
26 [REDACTED] By withholding documents from April until
27 November, Plaintiffs undermined the Court’s order staging discovery to facilitate early summary
28 judgment. *See* April 8, 2016 Hg. Tr. at 8. [REDACTED]

1 [REDACTED] Because the
2 documents were not produced until **after** all the 30(b)(6) depositions, it is unclear which is false:
3 the documents or the [REDACTED] LaFond Decl. ¶¶56-66. Rule 26(g) is supposed to
4 preclude this sort of conduct; sanctions are appropriate. *See Silva*, 2013 WL 3939500, at *3.

5 **E. The Most Severe Sanctions Are Appropriate.**

6 Blizzard and Valve put false statements into the FAC without investigating them, which
7 statements were the **only** support for Valve's claim to own the copyrights at issue. *See, supra* pp.
8 2-10. uCool has now been forced to litigate for over a year, at great expense, simply to prove
9 what Plaintiffs could have learned from talking to **their own employee**—that Plaintiffs do not
10 own the copyrights they assert. *See, supra* §IV(A). Valve's claim to own "100%" of DotA was
11 always meritless, thus dismissal of Valve's claim is the most appropriate sanction—this would be
12 so even if Valve actually owned a small part of DotA, because a lone non-frivolous claim cannot
13 save a complaint from Rule 11. *Kinderstart.com LLC* 2007 WL 831811, at *1. Likewise,
14 Blizzard made false allegations in the FAC without investigation and failed to amend or withdraw
15 the FAC after the allegations proved false, so Blizzard's claims too should be dismissed.

16 Pursuant to both Rule 11 and 28 U.S.C. §1927, Blizzard and Valve should also be required
17 to cover uCool's attorneys' fees since at least the date when the FAC was filed: had Plaintiffs told
18 the truth, neither staged discovery nor uCool's motion to dismiss would have been necessary.

19 In the alternative, if Plaintiff's FAC is not dismissed, Plaintiffs should be subjected to
20 evidentiary sanctions pursuant to Rule 26(g) for withholding relevant documents until after key
21 depositions were completed. *See Silva*, 2013 WL 3939500, at *3. uCool requests that Plaintiffs
22 be precluded from introducing declaration testimony from any of their 30(b)(6) witnesses—an
23 appropriate sanction that will obviate the need for uCool to take more 30(b)(6) depositions.

24 **V. CONCLUSION**

25 For the foregoing reasons, uCool respectfully requests that Plaintiffs and their counsel be
26 sanctioned pursuant to Rules 11 and 26(g) and 28 U.S.C. § 1927.

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DATED: January 11, 2017

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